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SUPREME COURT, U.S.

NO. 07-870

IN THE
SUPREME COURT OF THE UNITED STATES

Fall Term, 2007

TOM H. WHITESIDE,
Petitioner
v.
CARR, HUNT & JOY, L.L.P., DONALD M. HUNT, LATRELLE BRIGHT JOY AND GARY BELLAIR,
Respondents.

ON PETITION FOR REHEARING TO
THE TEXAS COURT OF APPEALS
FOR THE SEVENTH DISTRICT

PETITION FOR REHEARING

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GROUNDS FOR REHEARING

1. Texas appellate review of arbitration which facilitates fraud is a denial of access and renders "hollow [the plaintiff's] right to seek redress." [1]

2. Under the authority of 128 USCS §2106, where the lower Court's decision is obscure or influenced by a mistaken view of the law resulting in the appearance of justice not having been satisfied, this Court has the power "to require such further proceedings as may be just under the circumstances" to remand the case to the Court of Appeals to order the arbitrator to examine CHJ's records and reassess his decision or and direct the Court of Appeals to reassess its fact findings and legal conclusions.

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[1] Christopher v. Harbury, 536 U.S. 403, 414 (2002)

STATEMENT

It is the wisdom of history's teachers and judges which marks true access to justice. Historically, from Solomon's threat to cut the baby in half[2], to Daniel's separately questioning the condemning elders about Susanna[3], and Jesus' allowing Thomas to place his fingers in the wound, as stunningly shown by Caravaggio's "Incredulity of Saint Thomas"[4], to today's baseball arbitration, mass tort class action suits and Justices of the Peace solving neighbors' pet disputes, justice has been achieved by insuring to the extent possible that truth is exposed. Here, however, this arbitration has been marked by the extent to which the judges, from the arbitrator to the Texas Supreme Court, for one reason or

[2] 1 Kings 3:16-28 New Revised Standard Version.
[3] Susanna 47-63 New Revised Standard Version.
[4] "The Incredulity of Saint Thomas", Caravaggio, 1601-1602, oil on canvas, Sanssouci, Potsdam. Appendix

another have not sought to examine case concluding documents or find admitted fraud. Moreover, the Court of Appeals in deciding the merits confusingly misstated Whiteside's undue means argument and misapplied the law of "exceeded powers" leading to a strikingly wrong result. Thus this court should grant certiorari and order the Court of Appeals to order the arbitrator to examine CHJ's records of dealings with MHB and reassess his decision and direct the Court of Appeals to reexamine the facts and the law .

DENIAL OF ACCESS

How then did the Court of Appeals arbitrarily deny Whiteside meaningful access to the courts? Initially, what must be understood is the relative small size of the legal community in the panhandle of Texas. There are only two cities, Amarillo and Lubbock, in excess of 200,000

population in this area of Texas. The only law school in this area is Texas Tech in Lubbock. The firm in which CHJ merged is a relatively large firm with its main office in Amarillo and this satellite office in Lubbock. Unbeknownst to Whiteside, MHB began soliciting these CHJ lawyers to combine the firms, save Whiteside.[5] After apparently successful negotiations, Whiteside was informed in 2000 that he had to resign before the firms merged.[6] Whiteside withdrew on 10/31 and the next day CHJ and MHB became Mullen Hoard Brown Langston Carr Hunt & Joy in the same building with the same personnel.[7]

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[5] In re Whiteside, 07-06-0078CV, 2006 WL 1519430 (Tex. App. – Amarillo June 2nd, 2006, orig. proceeding). In re Whiteside, 07-06-0078CV 2006 LEXIS 5839 (Tex. App. – Amarillo June 27, 2006, orig. proceeding).

[6] Id

[7] Id

Considering the above stated size of the legal community, this merger was presumably known by the Court of Appeals' Justices who are from either Lubbock or Amarillo. There are only four Justices in the Court of appeals with two assisting as senior Justices. In fact, one of the retired Justices, John Boyd, had been asked by Hunt to be the arbitrator in this case but declined because of a conflict of interest. Interestingly, this justice had been placed on a panel to hear Whiteside's mandamus and only withdrew after he had been reminded of his previously stated conflict. The other justice is Mackey K. Hancock who joined the Court in July of 2005 and had previously presided over this case in the Lubbock District Court before the same was referred to arbitration.

The other relevant factor is the Court of Appeals' familiarity with two of CHJ's former partners, Don Hunt and Gary Bellaire. Both are appellate law specialists and practice frequently in this Court of Appeals. Hunt has taught the moot court teams at the law school for years to much success.

Finally, the arbitrator's, Joe Nagy, firm Crenshaw Dupree Milam officed in the same building in Lubbock as MHB before and after the merger.

But attorneys going through a divorce with their partners have the potential for as much aberrant behavior as one may unfortunately witness in every divorce. Suddenly, people regarded as salt of the earth become a little crazy and the truth is not in them.

So here well respected lawyers become unreliable. To win these attorneys represented to peers that things were not as they seemed. They represented to the arbitrator that they had an absolute defense to Whiteside's admitted breach of contract claim——dissolution.[8] They contended that what was a partnership one minute dissolved

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[8] Arbitration was held on September 27, 2005 with Joe H. Nagy, Sr. (hereinafter Nagy) as arbitrator under an agreement drafted and signed that day which provided pertinently: 1) "After November 1, 2000, Tom Whiteside was not paid pursuant to the said Paragraph, but was paid his participation percentage of the account receivables actually collected less his proportionate part of the expenses;" 2) "The parties agree that no evidence other than the contract will be considered at this hearing and the arbitrator will render a decision as a matter of law." The oral stipulations were as to the partnership agreement signed on March 1, 1995 and that on November 1, 2000 Hunt, Joy and Bellair joined MHB.

CHJ submitted their Brief on October 5, 2005 stating pertinently: "[D]issolution occurred pursuant to Paragraph 22a at the end of the day on 31 October 2000 ... [T]hat was both a dissolution by majority vote and by operation of law."

On October 25, 2005 Nagy issued his opinion finding no breach stating "[I]t was stipulated at the Arbitration hearing on September 27, 2005 that Tom Whiteside, Donald M. Hunt, Latrelle Bright Joy and Gary Bellair had terminated their relationship with Carr, Hunt & Joy, L.L.P. as of October 31, 2000. ... No other evidence or testimony was taken at the hearing."

For some reason the Court of Appeals in one part of its opinion assumed the "undue means" was the withheld evidence of dealings with MHB, not the fact CHJ misrepresented to the arbitrator it dissolved. *Whiteside v. Carr Hunt & Joy*, No. 07-06-0207-CV, 2007 WL 172028 (Tex. App. – Amarillo January 23, 2007) at p.4. Yet, later in its opinion, the Court of Appeals dismissed as an attack on the sufficiency of the evidence "Whiteside's contention the arbitrator had no evidence on which to decide whether the partner's actions constituted a dissolution or a merger without examination of CHJ's records of 'dealings' with MHB ...". Id at p.5.

the next. Despite later retreating from the claim of an actual dissolution, they continued to contend a dissolution occurred since "they voted with their feet".[9] (The partnership agreement required a vote to dissolve). Nevertheless, neither the arbitrator, the Trial Court, the Court of Appeals, or the Texas Supreme Court seemed concerned that officers of the Court had committed fraud to keep from paying a partner under the contract. Instead, the above entities accepted CHJ's argument that fraud was no defense because it could not be proven without the withheld documents. Despite Whiteside's request to the arbitrator, the Trial Court, the Court of Appeals and the Texas Supreme Court to examine CHJ's documents of

[9] On November 4, 2005 CHJ responded pertinently stating "...while no formal meeting was held or a vote taken, Hunt, Joy and Bellair voted with their feet ..."

dealings with MHB in camera to see if its claim was true, all demurred.

The height of arbitrariness of the Court of Appeals' decision is its "Catch 22"[10] argument that Whiteside could not show fraud under *Karaha Bodas*[11] because he was aware of the fraud before arbitration but agreed to limit the evidence to be considered which "negates his assertion that Appellees 'wrongly' withheld the records"[12] . But the undue means vacatur ground Whiteside asserted was not CHJ's withholding from Whiteside its merger talks but CHJ's representation to the arbitrator in its

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[10] Joseph Heller. Catch 22. USA: Simon & Schuster, 1961.

[11] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negra*, 364 F.3d 274 (5th Cir 2004), *cert. denied*, 543 U.S. 917, 125 S. Ct. 59, 160 L.Ed2d 202 (2004).

[12] *Whiteside v. Carr Hunt & Joy*, No. 07-06-0207-CV, 2007 WL 172028 (Tex. App. – Amarillo January 23, 2007). (The "undue means on which he relies is CHJ's 'withholding of its dealings with MHB")

presubmission brief, not submitted to Whiteside, that it dissolved.

The Court of Appeals further misstated the law in dismissing Whiteside's complaint of the arbitrator's exceeding his powers in finding a dissolution to be an "effort to bootstrap an evidentiary sufficiency complaint into a statutory ground for vacatur".[13] However, the arbitrator exceeds his powers if an award is not "rationally inferable from the facts" before him or he manifestly disregards the law if he commits an error "obvious and capable of being instantly perceived by the average person qualified to be an arbitrator" that results in "signifcant injustice." *Kergosien v Ocean Energy, Inc.*, 390 F.3d 346, 353-355 (5th Cir, 2004). Thus, the Court of Appeals stunningly contended that Whiteside could not

[13] See footnote 8.

complain about CHJ's failure to include evidence of dissolution in the submission agreement much less that CHJ admitted to the arbitrator that it had not actually dissolved.

REMAND

This Court has under 28 USC §2106 remanded cases to lower courts where the appearance of justice was not satisfied, where the lower court had a mistaken view of the law and to clarify the record. In *Proctor v. Warden, Maryland Penitentiary, 435 US 559, 560 (1978),* this Court relied on § 2106 in vacating a Court of Appeals plainly mistaken decision on a prisoner's claim ruling that "justice must satisfy the appearance of justice" (citations omitted). In *U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983),* this Court further invoked § 2106 in remanding to the District Court for its mistaken view of the law

of discriminatory intent. Finally, this Court in *Capital Cities Media, Inc. v. Toole, 466 U.S. 378* vacated a State Court judgment which did not disclose if that Court had ruled on federal claims and remanded to that Court to "clarify the record". A remand to the Court of Appeals to order the documents examined by the arbitrator, reassess the facts and reconsider the law will finally make the truth, as it did to Thomas, become evident.

CONCLUSION

For the reasons stated, Whiteside urges that this petition for rehearing be granted, that the Court remand and order the Court of Appeals to order the withheld documents examined by the arbitrator and correct its errors of fact and law.

Respectfully submitted,

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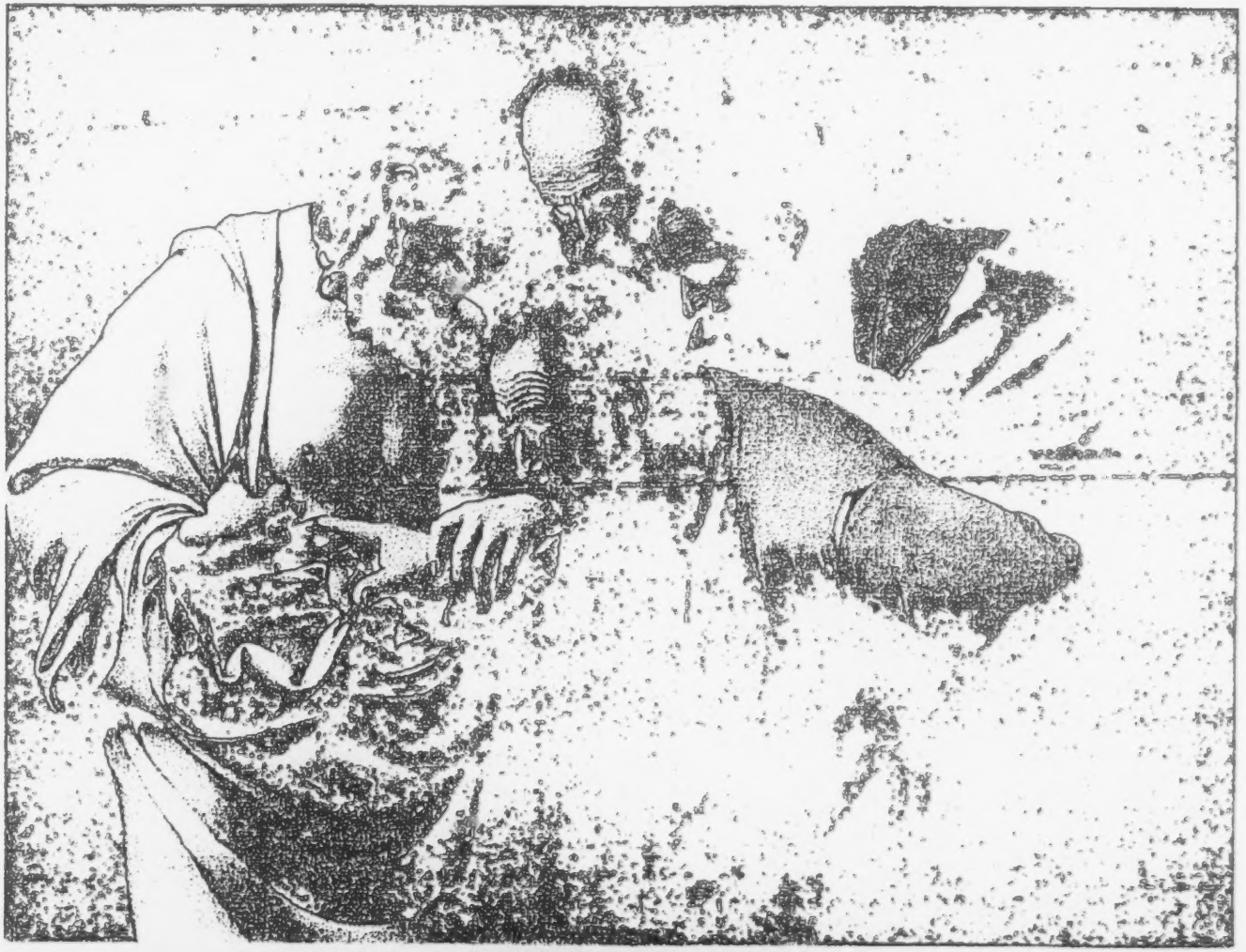
CERTIFICATE OF COUNSEL

I, Tom H. Whiteside, counsel for Tom H. Whiteside, certify that the this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44 of the Rules of this Court.

APPENDIX

The Incredulity of Thomas, by Michelangelo Merisi da Caravaggio



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